

FTC IMPLEMENTS REVISIONS TO HSR PREMERGER FILING REQUIREMENTS

July 12, 2011

To Our Clients and Friends:

The Federal Trade Commission (“FTC”) has issued the final version of long-anticipated amendments to the Premerger Notification Rules under the Hart-Scott-Rodino Act (“HSR”). Some of the revisions expand the burden of HSR compliance, especially for private equity funds, although the FTC has modified some of the most controversial amendments, which engendered strenuous objections after the initial proposal was announced last August. In addition, several of the FTC’s modifications simplify preparation of the HSR Form by removing outdated data and documentary requirements. The amendments will become effective thirty days after publication in the Federal Register, which should happen shortly.

ASSOCIATES

The most important change is the addition of certain reporting requirements relating to “associates” of a buyer, which include any entity (a “managing entity”) that has the “right, directly or indirectly, to manage the operations or investment decisions” of the buyer, as well as any entity that has its “operations or investment decisions, directly or indirectly, managed” by the acquiring person or by a managing entity. Under the current HSR rules, a party must provide information only about entities under common “control,” which the rules generally define based on 50% or greater equity ownership. Thus, for example, multiple limited partnership funds under common management but whose interests are held by various investors, none of which owns a 50% interest, are separate persons. This means that a filing reporting an acquisition by one fund (or its controlled portfolio company) does not include any information relating to other funds under common management or those funds’ investments. Such information might be of great interest to the antitrust agencies where, for example, a portfolio company of a related fund is a competitor of the target in the reported transaction.

The amendments extend the existing requirement that a buyer identify product overlaps between it (including its controlled entities) and the target entity or assets to include overlaps between the target and any associates of the buyer, including not only controlled entities of the associates but also entities in which an associate has a minority investment (at least 5%).

ITEM 4(D) DOCUMENTS

Item 4(c) of the current HSR Form seeks documents prepared by or for officers or directors of either party for the purpose of evaluating or analyzing the proposed transaction with respect to markets, market shares, competition, competitors, potential for sales growth or expansion into product or geographic markets. The amendments add an “Item 4(d),” which requires submission of three categories of documents, only some of which were required under the FTC’s existing interpretations of Item 4(c):

- any confidential information memoranda that specifically relate to the sale of the acquired entity or assets, or, if no such memoranda exist, any documents meant to serve the function of confidential information memoranda, in each case if prepared within one year before the HSR filing.
- documents prepared within one year before the HSR filing by “investment bankers, consultants or other third-party advisors,” during an engagement or for the purpose of seeking an engagement, if they contain content of the type responsive to Item 4(c) and specifically relate to the sale of the acquired entity or assets; and
- documents “evaluating or analyzing synergies and/or efficiencies,” but not financial models without stated assumptions.

Each of these requirements is limited to materials prepared by or for officers or directors, not lower level employees.

OTHER CHANGES

The revised HSR Form expands the revenue reporting requirement to include sales by foreign operations into the U.S., but it eliminates the need to provide “base year” (currently 2002) revenue data for any operations. The amendments also include numerous minor changes to the HSR Form.

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We will provide a more detailed discussion of these revisions to clients preparing to make an HSR filing. In the meantime, please do not hesitate to call us if you have any questions.

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